Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-2007

BILLY J. WILLIAMS
Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 145, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 368, AND NATIONAL AIRLINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT

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in the

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Billy J. Williams, the Petitioner herein, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals, Fifth Circuit, entered in the above entitled case on March 14, 1980.

ORDER BELOW

Court of Appeals, Fifth Circuit is reported at ___ F.2d ___ and is printed in Appendix hereto, page 1 and the judgment of the United States District Court for the Southern District of Florida is reported at ___ F.Supp. ___ and is printed in Appendix hereto, page 2.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was dated on March 14, 1980. The jurisdiction of this Court is invoked under 28 USC, § 1254(1).

QUESTIONS PRESENTED

1. Can a Union breach its duty of fair representation by unlawfully pressuring an employer to cancel the recall of a bargaining unit member and then enter into an agreement with that bargaining unit member which releases the Union from any liability for its unlawful action.

2. Can an employer covered by the Railway Labor Act violate an employee's rights under Section 2 (Fourth) of the Act and then enter into an agreement with that employee which releases that employer from any liability for its unlawful action.

3. In ascertaining the validity of an agreement and release between a union and bargaining

former's duty of fair representation, is it proper to use state law fraud principles as opposed to federal labor law principles.

4. Can a tripartite agreement between a union, an employer, and an employee extend the jurisdiction of an adjustment board.

5. Is there a violation of due process where at an arbitration hearing a bargaining unit member is represented by a union official who was involved in an action alleged to be a breach of the duty of fair representation which gave rise to the arbitration hearing.

STATUTES INVOLVED

This case involves Section 2 (Fourth) of the Railway Labor Act, 45 USC § 152 (Fourth) which is set forth in pertinent part below:

> 45 USC § 152 (Fourth) Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to

> influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions.

STATEMENT OF THE CASE

The petitioner, Billy J. Williams, is the plaintiff in the original suit filed in the United States District Court, Southern District of Florida. The respondents are the defendants in the case below. Specifically the respondents are the International Association of Machinists and Aerospace Workers, the International Association of Machinists and Aerospace Workers, District 145, and the International Association of Machinists and Aerospace Workers, Local Lodge 368 who were the petitioner's collective bargaining representatives. The other respondent is National Airlines, Inc., the petitioner's employer. For simplicity the parties will be referred to as follows:

> Petitioner Billy J. Williams will be referred to as Plaintiff.
>
> Respondents International Association of Machinists and Aerospace Workers and District 145 and Local Lodge 368 will be collectively referred to as IAM.
>
> Respondent National Airlines, Inc. will be referred to as National.

Federal jurisdiction in the lower court was based on 28 USC § 1331 (a) and 1337, 29 USC §§ 411 and 412, and 45 USC § 151 et seq.

Plaintiff Williams filed his original complaint in July 1975 in the United States District Court, Southern District of Florida. The cause was dismissed without prejudice on April 13, 1976 and reinstated with leave to amend on June 2, 1976. Several motions for Summary Judgment were filed by Defendants which resulted in dismissal of certain counts of the complaint. A non-jury trial was had on February 13, 1978, with the lower court granting Defendant's motion for involuntary dismissal under Rule 41(b). A timely appeal was filed in the Fifth Circuit Court of Appeals, which affirmed the lower court's opinion per curiam on March 14, 1980.

This was an action brought by an employee, Plaintiff Williams, against his union, Defendants IAM, and alleging that his union, the IAM, breached its duty of fair representation when it successfully sought to have Plaintiff's recall cancelled in August of 1971. Plaintiff also alleges that his employer, Defendant National, violated Plaintiff's rights under Section 2 (Fourth) of the Railway Labor Act when it acted upon the IAM's request to cancel Plaintiff's recall without valid business reasons.

In June of 1971 Plaintiff ceased to be a member of the IAM. In August of 1971 Plaintiff, who had been on layoff status, was recalled by National to return to work. Before Plaintiff could return to work certain officials of the IAM met with representatives of National and requested that National cancel Plaintiff's recall, implying that if his recall was not cancelled by National, National would encounter certain difficulties with its work force. Plaintiff learned of this attempt to have his recall cancelled and sought to have higher officials in the IAM stop the interference with his recall by the IAM officials, but no action was taken to stop the interference.

Plaintiff's recall was subsequently cancelled by National.

After his recall was cancelled Plaintiff filed a complaint concerning his seniority and in spite of numerous verbal and written requests to the IAM to process his complaint concerning his seniority over a period of two years, the IAM failed to process his complaint. Plaintiff then lost his seniority under the contract due to lapse of time.

After Plaintiff lost his seniority, National agreed to give Plaintiff back his job and the IAM agreed to represent him in an arbitration hearing concerning his seniority, if Plaintiff would enter into a three-party agreement with IAM and National whereby Plaintiff would have to release and waive all claims against the IAM and National, including all claims of the breach of the duty of fair representation on the part of the IAM and violation of his Section 2 (Fourth) rights against National arising out of the cancellation of his recall in 1971. Plaintiff signed the Agreement on December 10, 1973 and an arbitration hearing was held in the beginning of 1974, with the arbitrator's decision adverse to Plaintiff on the question of his seniority. Plaintiff filed the present suit in July 1975 alleging a breach of the duty of fair representation on the part of the IAM and violation of his Section 2 (Fourth) rights by National arising out of the cancellation of his recall in 1971. The trial of this case was held in February 1978, with the lower court refusing to hear testimony concerning the events surrounding the cancellation of Plaintiff's recall in 1971.

REASONS FOR GRANTING THE WRIT

The District Court characterized the action brought by Plaintiff in the case at bar as a dispute between an employee and his employer. In

paragraph 1 under Applicable Law of the Findings of Fact and Conclusions of the Law entered by the Court below, the Court cites Mungin v. Fla. East Coast Railway Co., 441 F.2d 728 (5th Cir.1970) as controlling in the instant case. However, the Mungin case involved a "minor" or "major" dispute between a group of employees and their employer-railway. The main complaint of the Plaintiff is not with his employer, National, but with his union, the IAM, for an alleged breach of duty of fair representation. National is in the suit as it is involved with the alleged breach of the duty of fair representation and as allegedly violating Section 2 (Fourth) of the Railway Labor Act. Of course, neither an alleged breach of the duty of fair representation nor a violation of Section 2 (Fourth) is a "major" or "minor" dispute under the Railway Labor Act. 45 USC § 152.

The District Court also cites Kline v. Fla. Airlines, Inc., 496 F.2d 919 (5th Cir.1974) as authority that the December 10, 1973 Agreement and Release is valid and binding as a matter of law. The Kline case involved a dispute between a group of employees and their employer. In both Mungin and Kline the original complaint arose out of action that the employer took against the employees. In the case at bar the complaint arose initially out of action that the IAM took against the Plaintiff which resulted in a complaint alleging a breach of the duty of fair representation. Because this action involves a breach of the duty of fair representation the Kline and Mungin decisions should not be controlling and other cases involving the breach of duty of fair representation should be reviewed.

The District Court concluded that it made no difference whether there was a breach of the duty of fair representation which led to the signing of the agreement and release because the Court did

not want to hear testimony concerning the cancellation of Plaintiff's recall at the request of the IAM (T. 28-29).

In the instant case, a prima facie case of breach of the duty of fair representation can be made out even from the stipulated facts. The District Court chose to ignore the prima facie case of the breach of duty of fair representation and did not want to hear other evidence concerning the alleged breach of the duty of fair representation. By refusing to hear evidence on the question of the breach of duty of fair representation and by failing to rule whether there was in fact a breach of the duty of fair representation on the part of the IAM, the District Court ignored Federal labor law principles and instead relied on State law. fraud principles.

Even without reviewing the cases, it would appear to be axiomatic that a union cannot breach its duty of fair representation and then seek to have the employee waive or sign away his right to fair representation. If a union could seek to have an employee waive his right of fair representation then the duty of fair representation would mean nothing because a union could breach its duty of fair representation almost at will and then use its influence, power and resources to coerce the individual employee into signing a release of the employee's claim of the breach of the duty of fair representation. In this case, if the December 10, 1973 Agreement and Release is upheld, whereby the Plaintiff had to release the defendant, IAM, from its duty of fair representation, then the door would be open for the IAM to breach its duty of fair representation as it chooses and then to use its resources to force employees to sign releases from the allegations of the employee for breaches of the duty of fair representation. This situation would, of course, have the effect of effectively

eliminating the union's duty of fair representation in contravention of all federal labor policies.

As to the December 10, 1973 Agreement and Release between the Plaintiff, National, and IAM, there are a number of cases which bear on the validity of that agreement. Basically, Plaintiff contends that the Agreement was invalid and illegal for the reasons set forth below.

First, the Agreement provided that Plaintiff would have to waive any claims for breach of the duty of fair representation against union defendants in order to have the IAM represent him at the arbitration hearing (R. 66,67). It has been held that a union's duty of fair representation imposed and defined by federal labor policy is not capable of being bargained away by workers even though a written contract or union by-laws might so provide. DeArroyo v. Sindacato de Trabajadores Packing, AFL-CIO, 425 F.2d 281, 286 (1st Cir. 1970). Also, as Plaintiff testified (T. 44,45), because of the union's action in having his recall cancelled Plaintiff was not able to afford the cost of prosecuting his claim of breach of duty of fair representation in the Courts and had to sign the Agreement and Release in order to have any chance to secure back his job. In a similar fact situation, where an employee signed a waiver of rights, and alleged that his union did not represent him fairly in securing these rights, the Court held:

> It would be anomalous to bar as a matter of law the Plaintiff's suit for an alleged breach of the union's fiduciary obligation because finding himself in economic straits due to the fiduciary's alleged misfeasance or non-feasance, he executed, upon its advice, a waiver of

rights that it should have secured for him.

Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 201 (4th Cir.1963). To permit the IAM in this case to be released from its duty of fair representation where the Plaintiff was forced into circumstances by the union's action where he had no viable choice but to sign the release, would permit the union Defendant here to profit from its own wrong and would subvert Plaintiff's right to be represented fairly.

The leading case in the duty of fair representation area has characterized the duty of fair representation as a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Vaca v. Sipes, 386 U.S. 171, 177 (1967). The Supreme Court, in an action under the Fair Labor Standards Act, has held that a statutory right conferred upon a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1944). The Court went on to hold that contracts tending to encourage violations of laws are void as contrary to public policy. Id., at 710. There can be no question that the statutory obligation imposed on the union to represent employees fairly is an obligation which affects the interest of the public and given this, the union should not be permitted to induce employees to waive or bargain away their right to be represented fairly.

There are several other cases which discuss this principle that statutory rights grounded in public policy are not to be lightly waived or bargained away. For example, the Fifth Circuit, in

discussing rights under the Fair Labor Standards Act, held that the obligation of the employer to meet the minimum working conditions prescribed in the act is statutory and a matter of general public policy and cannot be waived or contracted away by individual employers and employees. Mitchell v. Turner, 286 F.2d 104 (5th Cir.1960). The Ninth Circuit, in discussing rights under the Landrum-Griffith Act, held that the enactment of provisions for employees' rights was an expression of general public policy creating rights in members of labor organizations which cannot be waived or contracted away. International Brotherhood of Boiler Makers v. Rafferty, 348 F.2d 307 (9th Cir. 1965).

The 1973 Agreement and Release provided that an arbitrator would hear the dispute. The "Agreement and Release" also provided that the Agreement would settle all of Plaintiff's claims of breach of the duty of fair representation against the IAM (R. 66). By doing this, the IAM and National illegally extended the jurisdiction of the System Board of Adjustment to cover a private dispute, a dispute between an employee (the Plaintiff) and his union (the IAM) concerning the IAM's actions in seeking to have National cancel Plaintiff's recall. The authority or jurisdiction of the System cannot be extended by an agreement of the parties, for it is not a private board of arbitration. American Airlines, Inc. v. ALPA, 91 F. Supp. 629 (E.D.N.Y. 1950). Brady v. Trans World Airlines, Inc., 167 F.Supp. 169, (D.C.Del. 1958). The Supreme Court has also held that an adjustment board does not have jurisdiction to decide disputes between an employee and his union. Conley v. Gibson 355 U.S.41(1957). Thus, by extending the authority of the arbitrator beyond the statutory restrictions, the arbitrator had no jurisdiction to hear the dispute and this goes both to the validity of the 1973 Agreement and the validity of the arbitrator's award.

As to the provision of the December 1973 Agreement which called for a "final and binding" arbitration, the Supreme Court has recently addressed the question of the finality of an arbitration decision where there is a breach of the union's duty of fair representation involved. The Supreme Court held that, "The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." Hines v. Anchor Motor Freight, Inc., 96 S.Ct. 1048, 1058 (1976). In the instant case, the case would not have even gone to an arbitration but for the IAM's seeking to have Plaintiff's recall cancelled in the first place and the Plaintiff is further alleging that the union breached its duty in the handling of the arbitration hearing. Thus, the finality of the arbitration should not apply.

The Supreme Court has held that an employee can contract individually with his employer provided the individual contract is not inconsistent with the collective agreement or does not amount to or result from or is not part of an unfair labor practice. J. I. Case Company v. NLRB, 321 U.S. 332, 339 (1943). Here the agreement Plaintiff made with IAM and National is the result of and a part of an unfair labor practice, the breach of the duty of fair representation. Again, the threshold question, whether there was in fact a breach of the duty of fair representation in this case was erroneously ignored by the District Court.

If Plaintiff's allegations are true that his recall was cancelled at the insistence of the union and the union thereby breached its duty of fair representation, the collective bargaining agreement and statutory policy would call for full

back pay and benefits. However, in order to get his job back the Plaintiff was forced via the "Agreement and Release" to waive all back pay and benefits. The right to back pay where there is a discriminatory discharge is more than a private right which can be easily waived. The courts have held that the right of a discriminatorily discharged employee to reinstatement and back pay is not a private right subject, like an ordinary debt, to private adjustment, but is a remedy provided in the public interest in order to enforce a public right. NLRB v. Threads, 308 F.2d 1 (4th Cir.1962). An employer could force a discriminatorily discharged employee to waive back pay and reinstatement, and the employer would be more apt in the future to make discriminatory discharges if the employer knew that it would be free to try to force the employee to waive back pay, thus eliminating any penalty for its discriminatory action. Simply put, an employee cannot contract himself out of his rights under the Federal labor statutes. See National Licorice Co. v. NLRB, 309 U.S. 350 (1939) and NLRB v. Poultrymen's Service Corp., 138 F.2d 204 (3rd Cir.1943).

Finally, it follows from all of this, that if an employee himself cannot waive statutory rights, his union cannot act as his agent in waiving these statutory rights. Felter v. Southern Pacific Co., 359 U.S. 326, 336 (1959).

As authority for holding that there was no equitable basis for recision of the Agreement and Release, the Court cited in paragraphs 4 and 5 under Applicable Law, Florida Jurisprudence on Equity. Plaintiff submits that when dealing with an allegation of breach of the duty of fair representation that federal rather than state law should apply. Again citing the leading case in the area of breach of the duty of fair representation, the Supreme Court held that a breach of the duty

of fair representation by a union is a duty grounded in federal statute and that federal law therefore should govern where a breach of the duty is alleged. Vaca v. Sipes, 386 U.S. at 177. See Czosek v. O'Mara, 397 U.S. 25, 29, 30 (1970). The fiduciary obligation which an exclusive bargaining agent has is imposed by federal law, and federal, rather than state law, should be looked at when there is a question of the duty of fair representation. Brady v. Trans World Airlines, Inc., 401 F.2d at 94.

The District Court in paragraph 5 under Findings of Fact held that the Plaintiff "voluntarily" entered into the Agreement and Release, hence there was no equitable ground for setting aside or rescinding the Agreement. However, in looking at the testimony and facts of the case it can hardly be said that the Plaintiff "voluntarily" entered into the Agreement. The Plaintiff testified that he signed the Agreement and Release rather than file suit because he could not file suit due to the position he was put in by the union. (T. 44, 45). The union Defendant IAM, according to the allegations of the Plaintiff and the stipulated facts, had his recall cancelled. Plaintiff further testified that the IAM refused to process his complaint concerning the cancellation of the recall and because of these acts of the IAM, the Plaintiff was in a position where he could not afford to file a lawsuit and the only choice he had was to sign the agreement (T. 44). In this type of situation Plaintiff contends that it is better to look at cases decided under the federal labor laws to decide the issue, rather than recite an encyclopedia of state law such as Florida Jurisprudence which the District court cited as authority. In Thompson v. Brotherhood of Sleeping Car Porters which is very similar factually to the case at bar, the Court held in effect that an employee's action in signing an agreement such as the one

signed by Plaintiff here is not voluntary. 316 F.2d 191. Plaintiff contends that the District court ignored Federal case law and erroneously relied on State law.

The District Court, again relying on State law fraud principles, found that there was no fraud in the inducement of the Agreement and Release and therefore no basis for rescinding the agreement. This holding not only subverts Plaintiff's Federal right to be represented fairly, but is in direct conflict with the Fourth Circuit holding in Thompson. The District Court in Thompson also spoke in terms of state law fraud principles in determining whether a release signed by an employee alleging a breach of the duty of fair representation should be upheld. The Fourth Circuit held however that state law fraud principles were inappropriate and misleading where a question of the breach of the duty of fair representation is involved. Thompson, 316 F.2d at 197, 200.

There are several reasons, apart from the invalidity of the Agreement and Release, why National's Motion for the Involuntary Dismissal of the claims against National should not have been granted. First, count four of the complaint alleged that National violated section 2 (Fourth) of the Railway Labor Act. The parties stipulated that during the time when the Plaintiff was not a member of the union, that officials of the IAM requested that National cancel Plaintiff's recall and that after evaluating the statements made by the IAM, National did in fact cancel the recall of Plaintiff. (R. 898, 899). Section 2 (Fourth) of the Railway Labor Act is clear when it states that it shall be unlawful for any carrier to interfere in any way with the organization of its employees or to influence or coerce employeees in an effort to join or not to join or remain members of any labor organization. 45 USC § 152 (Fourth). The

Supreme Court has held in a case under the National Labor Relations Act that where an employer discriminates against an employee, upon the instigation of the union, encouragement of union membership is obviously a natural and forseeable consequence of any employer discrimination at the request of the union and that in such a case, the employer must be presumed to have intended such encouragement. Radio Officers Union v. NLRB, 347 U.S.17, 52 (1954). Also see NLRB v. Erie Resistor Corp., 373 U.S.221, 228. The Supreme Court further held that specific proof of intent is unnecessary where the employer's conduct inherently encourages or discourages union membership and that this is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. Thus an employer's protestation that it did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. Radio Officers, 347 U.S at 45. Even though the Radio Officers case was under the National Labor Relations Act it has been held that the same reasoning would apply to the anticoercion provisions of section 2 (Fourth) of the Railway Labor Act. Brady v. Trans World Airlines, Inc., 401 F.2d at 101. The Court held that the employer was automatically liable for violation of the provision against influencing or coercing employees to join or remain members of a labor organization when it wrongfully discharged an employee on the union's recommendation for violation of union security laws once it was established that the discharged employee's rights under that provision had been violated, regardless of the employer's intent. Id.

Using the reasoning of the Radio Officers and Brady cases, if the Plaintiff could show that

National wrongfully cancelled Plaintiff's recall at the urging of the Union, this would have the inherent effect of encouraging other employees to become or remain members of the Union because it would show the extent to which the union would go to favor member over non-members, even to the point of seeking to have non-union employees wrongfully discharged. It would be presumed that National intended the foreseeable consequence of its act, that is the encouragement of union membership and thus National would have violated the anticoercion provisions of section 2 (Fourth). For cases that hold that employer complicity in union discrimination may amount to the kind of coercion forbidden by section 2 (Fourth), see Carroll v. Brotherhood of Railroad Trainmen, 417 F.2d 1025 (1st Cir.1969).

Plaintiff contends that the rights given under section 2 (Fourth) are public rights and are analagous to the right of an employee to be free from the breach of the duty of fair representation and that these rights cannot be lightly waived. Just as the authority of the adjustment board cannot be extended to confer jurisdiction to hear breach of the duty of fair representation allegations, adjustment boards are not empowered to deal with alleged violations of section 2 (Fourth). It has been held that the enforcement of section 2 (Fourth) was entrusted to the courts, for no other agencies, least of all adjustment boards are either equipped or empowered to deal with conduct impairing the statutory right of employees to be free of coercion in choosing bargaining representatives. Brady v. Trans World Airlines, Inc., 223 F.2d at 365. Just as the Court below ignored Plaintiff's allegation of the breach of fair representation, the Court below also ignored Plaintiff's allegations of violations of section 2 (Fourth) of the Act. The Agreement and Release purported to resolve all claims against National

arising out of the failure of the recall in 1971, which would include Plaintiff's allegation that National violated section 2 (Fourth). This has the effect of extending the jurisdiction of the arbitrator to settle Plaintiff's allegations of section 2 (Fourth) violation. This would be an improper extension of the arbitrator's authority. The question of a section 2 (Fourth) violation can only be decided by the courts and the court below ignored Plaintiff's federal rights by failing to hear evidence on the question of a section 2 (Fourth) violation and to decide whether there was in fact a section 2 (Fourth) violation.

There is no question that Plaintiff has certain rights under section 2 (Fourth) of the Railway Labor Act and has the right to be represented fairly by his union. It follows that any agreement which is the result of or flows from violation of Plaintiff's statutory rights should be held invalid and that neither a company nor a union should be able to rely on such an agreement nor should they derive any benefits from such an agreement. To allow reliance on such an agreement would have the effect of defeating the statutory policies underlying the rights. National Licorice Co. v. NLRB, 309 U.S.350. Of course, if it is found that the Agreement and Release is invalid because it takes away the rights that the Plaintiff had, then neither National nor the IAM can rely on the agreement and both should respond in damages for violation of Plaintiff's rights. Richardson v. Texas and New Orleans Railroad Co., 242 F.2d 230, 236 (5th Cir. 1957).

Assuming arguendo that the arbitrator had authority to hear this case, there is a real question as to whether the Distric Court properly evaluated the evidence before it when the court ruled that Plaintiff was afforded due process at the arbitration hearing. It has recently been held

that the courts have an obligation to scrutinize with care even arbitration proceedings that superficially appear regular in all respects. Carrier Air-Conditioning v. NLRB, 547 F.2d 1178, 1192 (2nd Cir.1976). The evidence introduced at the trial below pointed to several areas which indicate that Plaintiff was not afforded due process at the arbitration hearing. For one thing Plaintiff testified that Wilbur J. Spurlock, an official of IAM, acted in a dual capacity of first requesting that Plaintiff's recall be cancelled and then supposedly acted in Plaintiff's behalf by representing him at the arbitration hearing and helping to select the arbitrator. (T. 46, R. 515). In one case which addressed this issue, it was held that "it is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining agent." Brady, 167 F.Supp. at 193.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June ____, 1980, pursuant to Supreme Court Rule 33, three copies of the foregoing petition for Writ of Certiorari were mailed to PLATO E. PAPPS, ESQ., GEORGE TUCKER, ESQ., and WILLIAM B. KILLIAN, ESQ.

ROGER D. HAAGENSON
Counsel for the Petitioner

Appendix

Billy J. WILLIAMS,
Plaintiff-Appellant,

v.

The INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, etc. et al., Defendants-Appellees.

No. 78-1711.

United States Court of Appeals,
Fifth Circuit.

March 14, 1980.

Appeal from the United States District Court for the Southern District of Florida; C. Clyde Atkins, Chief Judge.

Before TUTTLE, BROWN and TATE, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the district court's findings of fact and conclusions of law. ____ F.Supp. _____ (S.D.Fla. 1978).

UNITED STATES DISTRICT COURT

for the

SOUTHERN DISTRICT OF FLORIDA

Civil Action File No. 75-1509-Civ-CA

BILLY J. WILLIAMS
Plaintiff

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, et al
Defendants

FINAL JUDGMENT

This action came on for trial before the Court, Honorable C. Clyde Atkins, Chief, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, It is Ordered and Adjudged that all claims brought by plaintiff as set forth in all counts of the complaint are DISMISSED with prejudice, each party to bear its own costs.

Dated at Miami, Florida, this 15th day of February, 1978.

JOSEPH I. BOGART, Clerk

By: _____
Dep. Clerk of Court
Rose I. Greene

cc: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-1509-Civ-CA

BILLY J. WILLIAMS
Plaintiff

v.

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
Defendants

FINDINGS OF FACT &
CONCLUSIONS OF LAW

THIS MATTER is before the Court upon the defendants' Rule 41(b) motion for involuntary dismissal upon the close of all the evidence, including testimony and exhibits, received in plaintiff's case in chief. The Court is of the opinion that all the evidence bearing on the relevant issues of law have been submitted in the plaintiff's case in chief, and thus no further evidence need be adduced.

APPLICABLE LAW

1. In holding that parties to a labor dispute may lawfully agree to deprive a party of "any rights under the Railway Labor Act or any other laws for recovery of job rights," the Fifth Circuit Court of Appeals has held that:

> Title 45, U.S.C. Secs. 151, 152 and 154 to 163, known as the Railway Labor Act, is extended to carriers by air by Secs. 181 et seq. of Title 45, U.S.C.

> The act requires the representative of the parties involved to attempt to settle disputes or grievances, whether deemed "major" or "minor", Sec. 152 First. Elgin, Joliet & Eastern Railway Co. v. Burey, 1945, 325 U.S. 711, 65 S.CT. 1282, 89 L.Ed. 1886, on rehearing, 1946, 327 U.S. 661, 665, 66 S.Ct. 721, 723, 90 L.Ed. 928, 930. Sec. 152 Second directs that all disputes between a carrier and its employees "shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer."
>
> Under these mandates the parties then are required to try to settle a dispute before invoking the procedures for handling either (1) "major disputes", within the jurisdiction of the National Mediation Board, Sec. 183, Title 45 U.S.C., or (2) "minor disputes", Sec. 184, Title 45 U.S.C.

2. "(I)t is also well settled that failure to protest a settlement within a reasonable time, where allegedly the settlement was entered by the attorney without authority, works a ratification of the settlement since it is a client's duty, having actual or constructive knowledge of the settlement and its terms, to express his disapproval within a reasonable time. ... The failure by these persons to challenge the settlement has resulted, as noted above, in the payout of nearly $300,000, prior to any challenge of any type being made. Under these circumstances, I hold that by their silence, with knowledge, whether it be characterized as actual or constructive, they ratified. See Hot Springs Coal Co. v. Miller, 107 F.2d 677 (10 Cir. 1939); Powell v. Penna. Railroad Co.,

166 F.Supp. 448 (E.D. Pa. 1958), rev'd on other grounds 267 F.2d 241 (3 Cir. 1959); Beirne v. Fitch Sanitarium, Inc., 167 F.Supp. 652 at 654 (S.D.N.Y. 1958); Yarnall v. Yorkshire Worsted Mills, supra; cf. Kincade v. Jeffery-De Witt Insulator Corp. 242 F.2d 328 (5 Cir. 1957)." Mungin v. Florida East Coast Railway Company, F.Supp. 720, 736, aff'd, 441 F.2d 728 (5th Cir., 1970).

3. Where union members seek to set aside court-approved class action settlement against employer-railway for alleged violations for the Railway Labor Act and abrogation of collective bargaining agreements, and where said members accepted benefits in the form of payments made pursuant to this settlement, the members must make an offer to restore the status quo ante as condition to the relief sought. Id. at 725.

4. "Compromise agreements predicated on fraud or mistake are regarded as voidable. Such agreements may be attacked by bringing an action to rescind the contract, or by seeking the vacation of a judgment or decree that has been entered pursuant thereto. In either case, however, the injured party must, on discovery of the true facts, promptly announce his purpose to rescind. Furthermore, he must adhere to this decision and be guilty of no undue delay or vacillation in moving speedily to have his rights formally asserted. He cannot remain silent and continue to treat the benefits of a contract as his own. By his conduct, he may lose the right to rescind and thereby become conclusively bound by the agreement. It is, moreover, a general rule that a settlement agreement cannot be rescinded, even for fraud or misrepresentation, where it is not possible for the parties to return to their original positions, or be restored to their original rights, a fraudulently induced contract not being

illegal per se." 6 Fla. Jur., Compromise and Settlement §II.

5. "No rule is more settled than that equity aids only the vigilant. Equity discourages delay in the enforcement of rights, as nothing but good conscience, good faith, and diligence justify its action. It will not restore opportunities or renew possibilities that have been lost by neglect, ignorance, or even want of means. Rather, equity will remain passive, granting no aid to a complainant, even though he might have been entitled to such relief had he acted with reasonable diligence.

"Courts of equity view with disfavor suits brought long after the transaction involved has occurred, and after death prevents those familiar with the facts from testifying. They may deny relief even though the complainant's conduct is not pleaded as a defense. They will afford relief, however, where the complainant's inaction is occasioned by the defendant's fraud, but a very clear showing must be made where the party charged with fraud is dead.

"The maxim that equity aids the vigilant is applied in many situations. Thus, rescission, cancellation, or specific performance of a contract will be denied, unless the complainant acts promptly. A judgment or decree cannot be attacked where there is a lack of due diligence. Nor will equity allow a party to wait until another has improved property so that it becomes valuable before asserting an equitable claim."12 Fla. Jur., Equity §66.

6. In an analogous situation to the instant case involving judicial review of the System Board of Adjustment, the Fifth Circuit asserted that:

Appellants' contention at this late date that they never have known the nature of the charges is specious. The System Board found that they had actual notice of the charges against them at least from the date of the hearing before the hearing officer, if not before, and the district court correctly held that the decision of the System Board on whether appellants were properly discharged or not is final and binding on the courts and not subject to review on the merits by the courts. It was also correctly decided there that the courts can reverse the System Board only where there is a denial of due process before the Board and that such a review does not extend to proceedings before submission to the Board. These actions of the district court are firmly established in earlier cases before this court and by cases decided by the Supreme Court. In Gunther v. San Diego and Arizona Eastern Ry., 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308 (1965), with respect to the reviewability of awards made under the Railway Labor Act, 45 U.S.C.A. §151 et seq., said the following:

> This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment Board.
>
> The basic grievance here--that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health--has

> been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court, 382 U.S. at 263-264, 86 S.Ct. at 372.

This court has consistently followed Gunther in holding that district courts have no authority to review the System Board's awards. See Southern Pacific Company v. Wilson, 378 F.2d 533 (5 Cir.1966); and Rittle v. REA Express, 367 F.2d 578 (5 Cir. 1966). There are, however, very limited situations in which following the actions of a system board, authorized by the Railway Labor Act (supra), court review is available. These can arise only where there has been a denial of due process by some act of the Board in making an award. Southern Pacific Company v. Wilson, supra, and Edwards v. St. Louis-San Francisco Railroad Company, 361 F.2d 946 (7 Cir. 1966).

Rosen v. Eastern Air Lines, Inc., 400 F.2d 462, 463-64 (5th Cir. 1968).

FINDINGS OF FACT &
CONCLUSIONS OF LAW

Upon reviewing all the relevant evidence received in this cause, including the testimony and exhibits, the Court hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff, defendant International Association of Machinists and Aerospace Workers (IAM), and defendant National Airlines (NAL) entered into an "Agreement and Release" on December 10, 1973.

2. Said "Agreement and Release" provided that plaintiff was to be rehired by NAL.

3. In consideration therefor, said "Agreement and Release" provided that, inter alia, plaintiff resolves and settles all claims against defendants NAL or IAM arising out of the 1970 furlough and failure of recall in 1971.

4. Said "Agreement and Release" also provided that:

"3. Williams' seniority as mechanic will reflect that he is a new employee in accordance with Article 13(a) of the current NAL-IAM Agreement, unless modified by a neutral arbiter's Decision and Award as hereinafter provided for.

"4. Within sixty (60) days of the date of this Agreement, the parties will present the issue of Williams' seniority to a neutral arbiter agreed to by all three parties to this Agreement, or appointed by the National Mediation Board should the parties be unable to agree upon an arbiter. The issue to be presented to the arbiter will be whether Williams should have seniority to a new employee, or whether Williams' seniority date shall be June 23, 1969, the date that he was first employed by NAL. It is agreed by all parties to this Agreement that, in that final and binding arbitration:

"a) The arbiter shall have jurisdictional authority to make the necessary decision.

"b) The arbiter's decision shall be final and binding upon the Company, the Union, and Williams.

"c) The Company shall be entitled to make any and all arguments in support of its position that Williams should have seniority as a new employee, except that such arguments may not be used for the purpose of persuading the arbiter that he does not have the jurisdictional authority to render the necessary decision.

"d) Williams and the Union shall be entitled to make any and all arguments in support of his position that his seniority date as a mechanic should be June 23, 1969.

"5. Williams hereby states that he chooses that the IAM represent him in this arbitration matter, as he has full confidence in the ability and interest of the Union to fairly and properly represent him.

"6. That if the arbiter should decide in favor of Williams' position, Williams clearly waives all rights to back pay and any other direct or indirect monetary emoluments to which he may be entitled (including active service benefits for the period November 2, until December 10, 1973) except for active service benefits that Williams accrued between June 23, 1969, and November 2, 1970, the same to be restored to him and applied prospectively only from the date of the arbiter's decision."

5. Plaintiff voluntarily entered into said "Agreement and Release," knowing the legal effect of all terms therein, including his waiving the aforementioned rights of action against defendants. Hence, there was no fraud in the inducement

or other equitable grounds for setting aside said agreement.

6. All terms of said agreement were dutifully performed by both defendants.

7. "On February 4, 1974, an arbitration hearing was held in Miami with the three parties to the December 10, 1973 'Agreement and Release' present." Complaint, p. 5.

8. At said arbitration hearing, plaintiff was given notice of matters to be resolved there, and a full and complete opportunity to be heard. Plaintiff's counsel pursued plaintiff's position in a manner consistent with fundamental fairness.

Hence, plaintiff was afforded due process at said arbitration hearing.

9. Plaintiff did not complain of the legality of the December 10, 1973 "Agreement and Release" until after an adverse ruling on the question of his seniority status was made by the arbiter. Further, this action was not filed until July 30, 1975. These facts indicate bad faith, or lack of viglilance, and "unclean hands" on plaintiff's part such as to warrant denying the equitable relief of rescinding said agreement.

10. Plaintiff has received all the benefits conferred upon an employee of defendant NAL as a result of said "Agreement and Release." Hence, plaintiff has ratified said "Agreement and Release."

11. The benefits conferred on plaintiff as a result of said "Agreement and Release" are such as to preclude restoring the parties to the status quo ante. Hence, said "Agreement and Release" cannot, in equity and good conscience, be set aside.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. §§1331(a) and 1337, 29 U.S.C. §§411, 412, and 45 U.S.C. §151, et seq.

2. In equity, there is no basis for rescission of the December 10, 1973 "Agreement and Release," as set forth in Finding No. 5, supra.

The December 10, 1973 "Agreement and Release" and all the terms therein as discussed in the foregoing Findings of Fact are valid and binding as a matter of law. Kline v. Florida Airlines, Inc., 496 F.2d 919 (1974).

3. Even if said "Agreement and Release," and any terms therein, are not enforceable as a matter of law, plaintiff is estopped, as a matter of equity, from denying its existence in accordance with Findings Nos. 9, 10 and 11, supra.

4. Accordingly, plaintiff is barred from bringing all claims arising out of the "furlough in 1970, his recall and cancellation of recall and failure of recall in 1971, and any seniority lists that may have been published at NAL, and any alleged failures of a duty to fairly represent."

5. Inasmuch as plaintiff was afforded due process at the arbitration hearing (as discussed in Findings Nos. 7 and 8, supra), the Court cannot disturb the arbiter's decision.

6. Accordingly, it is hereby ORDERED AND AJUDGED that, pursuant to F.R.Civ.P. 41(b), all claims brought by plaintiff as set forth in all counts of the complaint are dismissed with prejudice.

To the extent that the above Findings of Fact constitute Conclusions of Law, they are adopted as

such. To the extent that the above Conclusions of Law constitute Findings of Fact, they are adopted as such.

Judgment shall be entered by the Clerk in accordance with the aforementioned Findings of Fact and Conclusions of Law.

DONE AND ORDERED at Miami, Florida, this 15th day of February, 1978.

C. Clyde Atkins
CHIEF UNITED STATES DISTRICT JUDGE

cc: George H. Tucker, Esq.

Roger D. Haagenson, Esq.

William B. Killian, Esq.